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IN THE

Supreme Court of the United States

October Term, 1962

WALTER J. TROTTER AND GEORGE D. SLABAUGH, for themselves and for and in behalf of EUGENE ZYNDA, et al., *Petitioners*,

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, DIVISION 1303; AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, AFL-CIO

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

Joint Brief for the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL-CIO, and Division 1303, in Opposition.

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IN THE

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October Term, 1962.

No. 802

WALTER J. TROTTER AND GEORGE D. SLABAUGH, for themselves and for and in behalf of EUGENE ZYNDA, et al., *Petitioners*

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, DIVISION 1303; AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYES OF AMERICA, AFL-CIO

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Joint Brief for the Amalgamated Association of Street, Electric Railway and Motor Coach Employes of America, AFL-CIO, and Division 1303, in Opposition.

OPINIONS BELOW

The district court's findings of fact and conclusions of law (17a-25a) and judgment dismissing the complaint (26a) are unreported. The opinion of the court of appeals (Pet. 1a-3a) is reported at 309 F.2d 584.

JURISDICTION

The opinion and judgment of the court of appeals were entered on November 9, 1962. The petition for a writ of

certiorari was filed on February 7, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the labor organizations serving as petitioners' collective bargaining agents fairly and impartially represented all the employes in the bargaining unit, and acted without hostile discrimination, in the steps taken to protect employes' job rights upon the sale of the employer's suburban operations.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 2-3 of the petition.

STATEMENT

On March 1, 1958, Central Greyhound Lines, hereinafter called Greyhound, sold its suburban operations in the Detroit, Michigan, area to Great Lakes Transit Co., hereinafter called Great Lakes (21a, Pet. 1a; 94b).[1] Prior to that date, the three suburban divisions sold, and an interstate highway division out of Detroit which Greyhound continues to own and operate, had constituted four separate seniority districts (20a-21a, Pet. 1a; 40b, 102b-103b). Also operative within each seniority district was a reciprocal system for seniority interchange between districts (20a, Pet. 1a; 103b, 96a-99a). This modification on strict district seniority was negotiated originally in 1953 and retained in subsequent Greyhound contracts by the respondent labor organizations serving as petitioners' bargaining agents (20a, Pet. 1a; 12b, 45b, 2b, 16b-17b). The concurrent seniority clause provided that (103b):

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[1] References preceding a semicolon are to the findings below; those following are to the supporting evidence.

> "Highway operators shall commence to acquire seniority on all suburban divisions * * * as of May 1, 1953. Suburban operators shall commence to acquire seniority on all highway operations and on all other suburban districts * * * as of May 1, 1953."

Under this clause, all operators accrued seniority in each seniority district from May 1, 1953 on an equal basis. No driver hired prior to this date suffered any dilution of seniority already earned within his own district. On the other hand, preservation of existing rights without dilution necessarily prevented any driver hired prior to adoption of the reciprocal system from transferring to another seniority district with full date-of-hire job seniority. No claim of unfair representation or hostile discrimination on the part of the bargaining agents is, or was ever, made with respect to this system as applied prior to March 1, 1958 (79b).

When, in January 1958, the union received notice of the prospective sale of Greyhound's Detroit suburban operations, the union officers sought to safeguard the job rights of the suburban drivers, who were fearful that Great Lakes would not hire them (21a, Pet. 1a; 6b, 70b, 76b, 98b-101b). As a result of the efforts of union officers, including the committeemen of the various suburban districts, Great Lakes agreed to hire all or any of the suburban drivers who elected to become its employes and assumed all of the obligations of the collective bargaining agreement then in force (21a, Pet. 1a-2a; 8b, 40b-41b, 42b-43b, 71b, 85b). Greyhound and Great Lakes also, at the union's urging, granted the suburban drivers a period of ninety days in which to decide, each for himself, whether he wanted to continue on the suburban work, as an employe of Great Lakes, or transfer to the highway district of Greyhound through the exercise of his concurrent seniority rights accrued from the May 1, 1953 cutoff date (21a, Pet. 2a; 84b-85b). However, no new contract negotiations were entered into at the time

of the sale regarding any driver's seniority rights; the discussions related to the orderly exercise of job rights under the existing contract, and to the physical transfer of the men and equipment (21a, Pet. 1a-2a; 94b-96b, 77b).

All but about 61 of the approximately 190 suburban drivers elected to become employes of Great Lakes under these arrangements (21a, Pet. 2a; 8b). These drivers retained their date-of-hire seniority on the suburban work and have had steady employment under Great Lakes' operation (21a, 24a, Pet. 2a; 23b, 35b, 8b, 27b, 30b).

There was not enough work on the highway operations to absorb the full-time employment of the former suburban operators who elected to exercise their May 1, 1953 seniority rights under the collective bargaining agreement and stay with Greyhound (22a). Accordingly, these operators prosecuted a grievance within the union alleging they were entitled to transfer to the highway division with their suburban date-of-hire seniority. This grievance was processed in the manner prescribed by the union constitution and was denied at every step in the appeals procedure (22a; 81b-82b, 86b-87b, 89b-90b, 93b).

Petitioners' complaint in the instant action also alleges in substance that the sale of the suburban operations in 1958 required the reapportionment of the remaining jobs among Greyhound employes on a date-of-hire basis (Pet. 2a; 3a-7a).

The district court heard the case on the merits and entered judgment for the union. It held that petitioners' seniority rights derived exclusively from the collective bargaining contract between Greyhound and the union, and that there was no evidence of any breach of the duty of fair representation in relation to the seniority and job rights of the former suburban operators (17a-25a).

The court of appeals affirmed, concluding (Pet. 3a-4a):

> "Whether the bargaining representative has acted fairly and impartially and without hostile discrimination depends upon the facts of each case. * * *"
>
> In the present case * * * *[petitioners'] real complaint appears to be, not that any existing seniority rights were taken from them or that other suburban drivers acquired rights which were not available to them, but that in connection with the sale they did not acquire better seniority rights than they already have * * *. We do not think that this constituted discrimination against them within the meaning of *Steele* v. *L.&N.R. Co.* [323 U.S. 192] *supra*, and *Ford Motor Co.* v. *Huffman*, [345 U.S. 330], *supra*.

The court of appeals further held that the sale of the suburban lines did not give rise to "a reduction in the forces of labor" within the meaning of Section 163 of the union's constitution setting forth principles applicable in the event of "suspension[s] of work" (Pet. 4a; 94a-95a).

ARGUMENT

Petitioners concede that, under the applicable decisions of this court, "a labor union is allowed a wide range of reasonableness in serving its members" and further, that the courts below applied "accepted standards" in finding the union's conduct "within that wide range" (Pet. 13). The petition, therefore, presents only a factual issue which does not warrant review by this court. *General Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491. In any event, the decisions below are clearly correct.

An essential element of any claim of unfair representation with respect to seniority rights is a showing that the action or inaction of the statutory representative complained of is motivated by bad faith or by a hostile intent to discriminate against a portion of the union's membership.

Ford Motor Co. v. *Huffman*, 345 U.S. 330, 337-339; *Steele* v. *L&N.R.C. Co.*, 323 U.S. 192, 202-203. See also, *Gainey* v. *Brotherhood of Railway Clerks*, —— F.2d ——(C.A.2), 52 LRRM 2196, decided January 14, 1963; *Hardcastle* v. *Western Greyhound Lines*, 303 F.2d 182, 184-186 (C.A.9); *Mount* v. *Grand International Brotherhood of Locomotive Engineers*, 226 F.2d 604, 607 (C.A.6), cert. den., 350 U.S. 967; *Ferro* v. *Railway Express Agency, Inc.*, 296 F.2d 847, 851 (C.A.2). Because this essential element is lacking here, petitioners' contention that the sale of the suburban rights created a duty, breached by the bargaining agents, to demand that Greyhound agree to establish date-of-hire seniority for all drivers, must fail.

It is sheer nonsense to suggest that, in addition to the extensive efforts undertaken to protect the existing job rights of the suburban drivers and to secure their employment by Great Lakes, the union was also required to reopen the contract with Greyhound to negotiate new seniority rights for suburban drivers. At the very least, failure to do so can scarcely be taken as a sign of bad faith or hostile motivation.

Petitioners' own testimony fails to support the claim that the former suburban drivers were discriminated against with respect to their seniority rights (52a-53a). And there was no other evidence of bad faith or hostile intent (39b, 42b, 50b, 54b-55b). Moreover, the facts summarized in the Statement amply demonstrate that petitioners' rights have not been sacrificed, far less arbitrarily sacrificed in favor of the highway drivers. Petitioners had the same seniority rights after the sale as they had before. They could continue on the suburban work as employes of Great Lakes with their date-of-hire seniority, or they could go to Greyhound highway work with the May 1, 1953 seniority provided in the collective bargaining agreement (21a, Pet. 2a; 2b-3b, 8b, 22b-23b, 26b, 30b).

Furthermore, the reciprocal seniority system which ad-

mittedly produced no unfairness or disparity of treatment prior to the sale created no differences in suburban drivers' rights compared to highway drivers'. The only distinction made was between drivers hired before and after the date the concurrent seniority system was instituted. Hence, petitioners' argument that the reciprocal seniority provision does not reflect relevant differences in interest or merit, and is thus contrary to the requirements of *Steele* and *Huffman*, lacks any factual foundation. If, as petitioners concede, there was a valid reason for selecting May 1, 1953 as a date for beginning concurrent district seniority, it would appear no less rational thereafter to maintain that date.

Nor does the union's constitution provide any basis for petitioners' claim that they are entitled to greater seniority rights because of the sale of the suburban districts. Seniority rights are, of course, created and controlled solely by the agreement negotiated between the employer and the union acting as the collective bargaining agent for the employes. *Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 526; *Ford Motor Co.* v. *Huffman, supra; Ingersoll* v. *Brotherhood of Locomotive Engineers*, 307 F.2d 257, 261 (C.A.6). In the absence of the May 1, 1953 concurrent seniority provision, petitioners would have had no seniority rights whatever in the Greyhound highway district.

In addition, petitioners read something into the union's constitution which patently is not there, in supposing that when an employer takes any action resulting in a reduction in the number of employes, the last hired must be the first laid off. The most that can be said of the constitutional provisions relied upon is that they recognize either *system* seniority or *division* seniority, whichever is created by the contract with the employer (94a-95a). Moreover, Section 163 referring to suspensions of work and reductions in force has never been interpreted as applying to the changed work situation created by the sale of transporta-

tion properties (72b, 8b). Hence, the court of appeals correctly found the union constitutional provisions inapplicable here.[2]

In sum, neither the union's constitution nor the provisions of the National Labor Relations Act, as amended, compels a collective bargaining representative to limit seniority classes solely to the relative lengths of employment of the respective employes. *Ford Motor Co.* v. *Huffman, supra,* 345 U.S. at 338-339; *Aeronautical Lodge* v. *Campbell, supra,* 337 U.S. at 528-529; *N.L.R.B.* v. *Wheland Co.,* 271 F.2d 122, 124-125 (C.A.6).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[2] There is no inconsistency between the facts found by the district court and the ruling of the court of appeals in this respect. Petitioners' contention that the appeals court redetermined issues of fact, thereby exceeding its reviewing jurisdiction, is groundless.

CERTIFICATE OF SERVICE

I hereby certify that on March ....., 1963 a copy of the foregoing Brief was served upon counsel for petitioner by depositing the same in the United States mail, air mail postage prepaid.

EARLE W. PUTNAM